United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1211

IN THE

United States Court of Appeals

For the Second Circuit

No. 75-1211

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

SAMUEL KAPLAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF

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BRIEF FOR APPELLANT SAMUEL KAPLAN

Preliminary Statement

The Appellant, Samuel Kaplan, appeals from a Judgment of Conviction in the United States District Court for the Eastern District of New York, adjudging him guilty of one count of violating Title 21, United States Code, Section 841(a)(1). As a result of this conviction, the Appellant was sentenced

to the custody of the Attorney General, or his duly authorized representative, for a period of eight (8) years with a Special Parole term of ten (10) years. The Appellant is presently at liberty on bail pending appeal.

The Indictment appears on page seven (7) of Appellant's Appendix.

STATEMENT OF THE FACTS

This is Samuel Kaplan's second appeal to this Court from a conviction following a jury trial on Indictment No. 72 CR 851. Retrial was prompted by reversal of Kaplan's earlier conviction in United States v. Kaplan, 510 F.2d 606 (2nd Cir., 1974).[1]

The Government's case in this retrial, without significant exception, tracked the proof offered at the first trial. Once again, the Government relied upon the testimony of Nicholas Alleva, a Special Agent of the Drug Enforcement Administration. (A 23)[2] Alleva testified that in late 1971 and January of

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[1] On retrial, Kaplan was acquitted of count one which charged possession of heroin with intent to distribute.

[2] The letter "T" refers to the trial transcript while the letter "A" refers to Appellant's Appendix.

1972, while acting in an undercover capacity, he purchased small quantities of heroin from Frank Lang. (A 25)[3] On November 29th, 1971, Alleva bought one ounce of heroin from Lang and later complained that the quality was poor. (A 26)

On January 5th, 1972, Alleva telephoned Lang to arrange another one ounce purchase. (A 26 - 27) A meeting was set for the following afternoon at Lang's home. During this conversation, Alleva again complained about the quality of the earlier purchase and was assured by Lang that the merchandise would be better. (A 26) Lang was also alleged to have stated that his "connection" would be present on the following day.

On January 6th, at 2:00 p.m. Alleva, under the close scrutiny of surveillance agents, went to Lang's home.[4] Entering the one-family house, the agent met Lang and was invited to an upstairs bedroom. (A 28) Once in the bedroom, Alleva met the Appellant, Samuel Kaplan, whom he did not previously know. (A 29, 57) Abandoning normal social amenities, Lang,

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[3] Prior to the filing of the instant Indictment, Lang died, apparently from an overdose of narcotics. (T 131)

[4] At the time Lang resided with his parents and sister.

without introducing Alleva to Kaplan, reached into a night-table drawer and produced the familiar transparent plastic bag containing white powder. (A 30) Pretending to be just mildly pleased, Alleva displayed mock caution in an effort to draw Lang out of the house. (A 31) Alleva stated that the money was in his car and that either Lang, Kaplan or both would have to accompany him to get it. (A 31) According to Alleva, Kaplan joined the conversation by asking "Why do we have to go down to get the money?" (A 33) In response, Alleva stated that, "You guys beat me once and you are not going to do it again." (A 33) Allegedly persuaded by this logic, Kaplan directed Lang to go outside with Alleva. (A 34) Before leaving the room, Alleva, according to his testimony, expressed his expectation of quality (this time directly to Kaplan). Kaplan allegedly replied that, "It is five-hit stuff. I hit it five times myself." (A 35) Alleva then explained to the jury, in effect, that this was an unshakable attestation of high quality. (A 35) After this brief verbal exchange, Alleva left the house with Lang and proceeded to an unmarked Government vehicle. (A 38) In the car, Alleva conducted a field test which revealed the narcotic content of the white powder. Alleva then went to the trunk of the car, telling

Lang that he was getting the money. (A 38) The open trunk, however, was a signal to the surveilling agents to move in and arrest Lang. (A 33)

As at the first trial, the Government's only other witness was Larry Burstein, another D.E.A. agent who was on surveillance duty outside the Lang residence. (T 81) Burstein observed Alleva enter the house at approximately 2:00 p.m. and come out some five minutes later with Lang. (T 82 - 83) While other agents arrested Lang, Burstein saw Kaplan come out of the Lang residence. (T 84) Kaplan was stopped as he was walking toward his own vehicle and placed under arrest by Burstein. (T 85 - 86)

The defense case changed somewhat from the first trial. Kaplan did not testify in his own behalf. It was established by other witnesses, however, that Kaplan was present in the Lang home on that day in order to help Frank Lang obtain employment. Tobias Gold, the owner of a carpet business, testified that he knew Samuel Kaplan for some twenty years, having met him while they were both employed as carpet mechanics. Gold recalled that, at Sam Kaplan's request, he had previously agreed to employ Frank Lang. (A 116 - 117) On the day in question, Gold received a telephone call from Kaplan which he

returned that evening. When Gold finally spoke to Kaplan, the Appellant stated; "Forget about it. I was going to ask you to give this Lang fellow a job again, but he got arrested today." (A 117) In fact, Kaplan told Gold that he himself had been arrested on that day. (A 118)

Patricia Ruggerio, the married sister of Frank Lang, was once again called as a witness for the defense. In this trial also, she described the close relationship between her brother and Kaplan whom she had known for seven years. (A 89) In the past, Kaplan had gotten a job for her brother and they had both worked as floor carpeters. (A 90) On January 6th, 1972, she was at home when Kaplan came to the house at about 12:30, an hour and a half before Agent Alleva. (A 91) Also before Alleva arrived, a young couple entered the house and went to her brother's bedroom. (A 93 - 94) Shortly thereafter, Kaplan went to young Lang's bedroom to make a phone call in an attempt to get him a new job. (A 97) This testimony was consistent with the testimony of Tobias Gold about the phone call he received. While this call was being made, the man and woman who were also upstairs, were asked to wait in Patricia's room. (A 97)

Thereafter, another individual, obviously Alleva, entered Frank Lang's bedroom. (A 98) After Lang and Alleva went out of the house, the couple left through a back door. (A 99) Although the house was alleged to have been under surveillance, there was no other testimony about a couple entering or leaving. However, Anthony Mandano, a neighbor of the Lang family, was called to establish that a good number of surveillance agents had the wrong house under observation. (T 110) On January 6th, federal agents came into his house and told him that they had his son under arrest. (T 117) Completely panicked, Mandano finally convinced the agents that they were in the wrong house. (T 117) Mandano also noted that two agents were in his back-yard. (T 118)

STATUTES INVOLVED

Title 21, United States Code, Section 841(a)(1) states as follows:

> "(a) Except as authorized by this sub-chapter, it shall be unlawful for any person knowing or intentionally --
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

QUESTIONS PRESENTED

1. Whether the Trial Court erred in admitting the January 5th hearsay declarations of Frank Lang?

2. Whether it was error for the Trial Court to exclude non-hearsay statements of the Appellant made moments before he was alleged to have engaged in the illicit sale of narcotics?

POINT I

THE TRIAL COURT ERRED IN ADMITTING THE JANUARY 5TH TELEPHONE CONVERSATION BETWEEN AGENT ALLEVA AND FRANK LANG.

Appellant's principal attack on appeal concerns what he alleges to have been the erroneous introduction of Lang's hearsay statements to Agent Alleva over the telephone on January 5th, 1972. If this claim evokes feelings of deja-vu, it is because this is the very same conversation on which this Court reversed Kaplan's earlier conviction. United States v. Kaplan, supra. To place Kaplan's present argument in the proper context, it is necessary to review this Court's decision in that case. But first a word about the conversation itself.

It is easy to understand why the Government attorney

fought so energetically to have Lang's hearsay declaration that his connection would be present the following day admitted into evidence. As this Court stated in its opinion on the Government's petition for rehearing,

> "The evidence, from a single witness, was sufficient to sustain the judgment on appeal, but was scarcely 'overwhelming.' "

Whereas in other more elaborate narcotic conspiracy cases, this may have only been a cog in the Government's proof, here the statement was of chilling significance. Judge Frankel, in writing for this Court, described the statement as a "potent addition to this case." 510 F.2d at p.610. For purposes of Appellate review, therefore, the impact of this statement cannot be minimized.

In offering this hearsay at the first trial, the Government volleyed with two competing theories. First, the "state of mind" exception to the hearsay rule and, second, the co-conspirator exception on the allegation that Lang and Kaplan had already entered into an agreement on January 5th. This Court, of course, ruled that the "state of mind" exception was inappropriate under the facts of this case and left open the question of whether the District Court would have been sustained had the co-conspirator exception been applied. In

the original opinion, Judge Frankel stated that had a finding of an agreement been made, it "would have been highly likely to stand on appeal." 510 F.2d at p.612. Later, on the petition for rehearing, the Court stated that the evidence in this case,

> ". . . does not entitle us to assume that the trial judge would - or should - have made the determination he withheld and which we have been asked to make for him on appeal." 510 F.2d at p.613.

Prior to this trial, counsel for Appellant submitted a memorandum in support of the position that the hearsay should be excluded.[5] The argument presented was two-dimensional. First, counsel unsuccessfully argued that exclusion of the hearsay at the second trial was mandated by "the law of the case." Second, it was alleged that there was insufficient proof to find that Kaplan had entered into an agreement with Lang on the previous day, January 5th. Over objection, however, the conversation was admitted into evidence. It came in as follows:

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[5] Oral argument on this issue appears in the Appendix at pages A 9 through A 22.

"Q Directing your attention to January 1972, do you recall a telephone conversation which you had with Mr. Lang?

A Yes, I did.

Q On what date?

A On January 5.

Q Can you tell us who made the phone call?

A I called Lang.

Q Where did you call him?

A At his residence.

Q What did you say to him and what did he say to you?

MR. SHARGEL: Note my objection to this, your Honor.

THE COURT: Yes, objection is overruled and you have an exception.

A The phone call was an extension of our discussion as to the quality -

MR. SHARGEL: I object as not responsive to the question.

THE COURT: Overruled. Go ahead.

A It was an extension of our discussion as to the quality. I told him I was completely dissatisfied with the previous purchase and that I wanted a better wuality on the next purchase.

Lang told me that this would be done as his connection would be at his house tomorrow at 2:00 p.m. and that I should go there with another $1300 and I could get an ounce of heroin which would be much better quality.

Q What did you say?

A I agreed." (A 26 - 27)

On this appeal, Kaplan further advances the arguments raised below.

LAW OF THE CASE

This Court's opinion in United States v. Kaplan, supra focused on two major issues. The first was whether the hearsay declarations of Lang properly fell within the "state of mind" exception to the hearsay rule. Judge Weinstein's belief that it did, of course, was the ground for reversal. The second part of the opinion considered the applicability of the exception for co-conspirators' declarations and the ultimate effect of Judge Weinstein's "express elimination of the co-conspirator exception as a justification for receiving the testimony." In this well-reasoned and carefully drawn opinion, which was obviously given further consideration on the Government's petition for rehearing, Judge Frankel wrote:

"In all the circumstances, therefore, appellant is entitled to a new trial at which this hearsay will be excluded." 510 F.2d at p.610. (Emphasis supplied)

Recognizing that the case would "presumably be retried", see Footnote 4 at p.612, the Court, considering "all the circumstances", directed that this hearsay should be excluded at the retrial. Although this Court discussed another option open to Judge Weinstein - the co-conspirator exception - the above quoted language did not, it is submitted, allow the second District Judge to admit the hearsay contrary to this specific directive. This point was fully raised and briefed in the Court below:

"MR. SHARGEL: The thing I would like to add is that it is true from the opinion of the Court of Appeals it did not necessarily conclude as a co-conspirator statement it was inadmissible but by the same token they did not conclude it was admissible and I think I would address myself to that in my memorandum of law.

I think one, I would like to press my claim as to its inadmissibility as the law of the case.

THE COURT: No, that is not so.

MR. SHARGEL: Well, for the record I would like to press that claim." (A 10)

* * *

"[MR. SHARGEL]: Let me say once more, how can we ignore Judge Frankel's language? We would have to totally ignore this language and I quote from the slip of opinion 57997: 'In all the circumstances therefore appellant is entitled to a new trial at which this hearsay will be excluded.'

They knew what the evidence was, they knew it would come back for a new trial. They knew the evidence would be substantially the same. Is this mere rhetoric this statement - 'new trial at which this hearsay will be excluded?'

THE COURT: It does not seem to represent the view of the court I do not know why they left it in.

MR. SHARGEL: I do not see any evidence it does not represent the view of the court, Judge.

THE COURT: Well, if that was the ruling for the second trial they would have stopped the opinion there. Then they go on to say why it might be admitted on a different theory.

MR. SHARGEL: There is no concurring opinion, there is no dissent and yet we have that language there. I cannot imagine that it is mere rhetoric.

THE COURT: I do not think it would be proper for me to exclude it under the opinion. It says they have a clear sense that the judge would have been sustained if he had allowed the hearsay to come in as a co-conspirator exception so I am going to receive it. You have an exception.

MR. SHARGEL: I have my exception." (A 21 - 22)

Judge Judd, therefore, took this Court's opinion to mean nothing more than that Kaplan had won a new trial where the same evidence would come in under a different label. In this view, the Kaplan case was treated as little more than an intellectual exercise with little, if any, effect on the re-trial.

Appellant again submits that the specific directive to exclude the hearsay did not permit the District Court to admit that hearsay under the co-conspirator exception. The prohibition found in this language is too clear and categorical. In United States v. Fernandez, 506 F.2d 1200 (2nd Cir., 1974), this Court recognized the rule that:

> "Where a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court."

1B J. Moore, Federal Practice, Section 0.404[10] at 571 (2d ed. 1974). Nearly four decades ago, this Court, in Munro v. Post, 102 F.2d 686 (2nd Cir., 1939) defined "law of the case" as,

> ". . . the duty of the lower court to

> follow what has been decided by a higher court at an earlier stage of the case, applies to everything decided either expressly or by necessary implication." 102 F.2d at 688.

See, also, In Re Sanford Fork & Tool Co., 160 U.S. 247 (1895).

Black's Law Dictionary defines the word "mandate" as:

> "A command, order or direction, written or oral, which court is authorized to give and person is bound to obey."

There is an unequivocal "direction" in the Kaplan opinion that at retrial ". . . this hearsay will be excluded." For this reason alone, therefore, the conviction should be reversed.

CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE

Assuming for the sake of argument that this Court's direction to exclude the hearsay may be simply ignored, Appellant submits that the evidence, considered in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60 (1942); United States v. Brasco, --- F.2d --- (2nd Cir., May 21st, 1975), slip op. p.3619, was insufficient to establish by a fair preponderance of the evidence that Kaplan had entered into an agreement with Lang on January 5th, the day prior to the sale. United States v. Geaney, 417 F.2d 1116 (2nd Cir., 1969). The question admittedly is a close

one. In the original Kaplan opinion, the Court noted that if Judge Weinstein had made the requisite finding of an agreement on January 5th, it "would have been highly likely to stand on appeal." 510 F.2d at p.612. Upon later consideration of the Government's petition for rehearing, this Court, distinguishing United States v. Rosenstein, 474 F.2d 705 (2nd Cir., 1973), stated that:

> "We must go on the premise that the pertinent evidence failed to supply [Judge Weinstein] with assurrance sufficient to justify the exception for co-conspirators' declarations. This seems specially evident when we compare the character of this evidence in the present case with that in Rosenstein." 510 F.2d at p.613.

The Court went on to note that, unlike Rosenstein, the proof in the case at bar was "scarcely overwhelming." Clearly, therefore, there was no compelling evidence which would dictate that such a finding be made.

The question, of course, is whether Judge Judd erred in his finding that Kaplan "conspired" or entered into some sort of conspiratorial agreement with Lang prior to the date of the alleged sale and, more specifically, whether a conspiratorial agreement was in existence on January 5th. It is an elementary principle of criminal law that the co-conspirator exception

to the hearsay rule applies only when the statements are made during the course of the conspiracy. Lutwak v. United States, 344 U.S. 604, 617 (1953); United States v. Calabro, 449 F.2d 885 (2nd Cir., 1971); United States v. Fantuzzi, 463 F.2d 683 (2nd Cir., 1972).

Although Agent Alleva met with Lang on some four occasions in late 1971 and January of 1972 to discuss or purchase heroin, Kaplan does not come into the picture until 2:00 p.m. on January 6th, 1972. (A 57) Moreover, there was nothing said by Lang either on January 5th or January 6th to identify Kaplan as his source or connection on any prior occasion. Nor, contrary to what the Government will undoubtedly argue, is there anything said by Kaplan on January 6th which would sufficiently indicate that he had previously supplied Lang with the drug. In the Lang residence on January 6th, Alleva attempted to place the purchase in the context of his entire dealings with Lang. But surely the plural references are too oblique to support a finding that Kaplan had actually been involved. It is particularly important to note that prior statements of Alleva reflected earlier conversations with Lang wherein Lang stated, in effect, that he had many sources of heroin and that one was drying up after another. (A 16) There was, therefore, no

continuity or pattern which would indicate any prior collusion between Lang and Kaplan.

It is well established that the requisite independent evidence of illicit association may be totally circumstantial and may be proven by evidence of acts occurring after the time at which the association is alleged to be in existence. United States v. Ragland, 375 F.2d 471 (2nd Cir., 1967). However, the mere fact that a sale occurred on January 6th does not adequately establish that there had been a prior association.

A useful case for comparison is found in United States v. D'Amato, 493 F.2d 359 (2nd Cir., 1974). There, Agent Mc Elroy, also dealing with an intermediary who died prior to trial, established a pattern of conduct which left no doubt as to the existence of a tightly knit conspiracy. The involvement of Appellants D'Amato and Zito was not isolated. Not only were they seen on February 20th, but on March 26th, one day prior to the second sale, Burdieri stated that his source was the same as in the prior transaction. From the conduct of Appellants over a period of time, it could be easily inferred that all parties were part of one joint venture. The case at bar is significantly different. There is no evidence that Kaplan supplied the heroin for Lang's sale to Alleva on

November 29th other than his non-committal demurrer to Alleva's statement that "You guys beat me once." Kaplan's alleged conduct on January 6th stands completely alone with no evidence to suggest that this was not an isolated transaction. Just as an isolated purchase of drugs does not, by itself, imply sufficient awareness of a wide-ranging conspiracy to qualify the buyer as a member thereof, United States v. Torres, --- F.2d --- (2nd Cir., July 2nd, 1975) sl.op. p.4573, an isolated sale in and of itself does not signify that there was a prior existing agreement between buyer and seller. This Court stated in United States v. Borelli, 336 F.2d 376 (2nd Cir., 1974) that:

> ". . .a sale or purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction."

It would seemingly follow that an alleged sale of one ounce of heroin on a particular day, without anything more, would not be sufficient to infer a pre-existing agreement between the parties.

POINT II

THE TRIAL COURT'S FAILURE TO ALLOW TESTIMONY AS TO STATEMENTS MADE BY THE DEFENDANT MOMENTS BEFORE THE ALLEGED SALE OF HEROIN WAS ERRONEOUS.

As developed in our Statement of Facts, Kaplan's defense, as it was in the first trial, was that his reason for being in the Lang home was unrelated to any illegal transaction; that he was there merely to help young Lang find employment. With Lang dead, it was necessary to indirectly establish this explanation for Kaplan's presence. At this trial, unlike the first, the Court refused to allow in evidence a very relevant conversation between Kaplan and Lang in the presence of Patricia Ruggerio. At that first trial, the conversation was related as follows:

"Q Did Mr. Kaplan and your brother have a conversation at the table in front of you?

A Yes.

Q Will you tell us what the conversation was about?

A Mr. Kaplan was trying to convince my brother to go back to work.

Q And was that conversation also on the phone that Mr. Kaplan was offering your brother anything -

A Yes.

MR. KAPLAN: I object to that. It is leading.

THE COURT: Yes, I think the witness ought to tell us what she heard.

Q Tell us what you recall of that conversation as best you can, please.

A Well, Mr. Kaplan was trying to tell my brother that it would be better if he went back to work again. He would be busy. It would give him something to do.

Q Was there any talk about where your brother should work?

A It was doing floor carpeting. And he said - and Mr. Kaplan said he knew a place where he could get him a job.

Q Did he offer to do anything for your brother with respect to getting him the job?

A Yes. He said he would make a phone call and call the store, you know, where the job was." (Transcript from trial before Judge Weinstein, A 126 - 127)

At the retrial, Judge Judd refused to allow the conversation:

"Q Did you have any conversation with Sam Kaplan that day?

A Yes, he came into the kitchen and had coffee with my mother and brother and I. He told my brother he could get him a job, you know, in

carpeting and he was telling - like he always told my brother -

MR. KAPLAN: I would object to conversations at this point.

MR. SHARGEL: Conversations of the defendant, this is his activities that day.

THE COURT: I don't know how that becomes admissible.

MR. SHARGEL: Might we have a sidebar?

THE COURT: All right.

(The following occurred at sidebar)

MR. SHARGEL: I hate to cite precedent about this trial, it came out at the last trial. We're retrying the event of that day -

THE COURT: How can she testify to what he said?

MR. SHARGEL: She testified at the last trial - we're talking about the last trial - testified at the last trial to the conversation that she had with him.

THE COURT: What makes it admissible?

MR. SHARGEL: I say its admissible as part of the res gestae. It's not self serving. It's not admitted as to the truth - let me say that, not admitted for truth, just a matter of what was said, his statement. He is supposed to have been involved in an illicit transaction that day. This witness is able to supply what happened on that day.

THE COURT: She can say what happened. She can't say what he told her. Admissions can be used against him, but he can't put in his own testimony through somebody else.

MR. SHARGEL: I'm not suggesting that is coming in as admission. It's coming as the events of that day.

THE COURT: She can testify to events, but not the conversations.

MR. SHARGEL: There is a very essential element of this conversation which is directly relevant to what Sam Kaplan was doing in that room.

THE COURT: She can't get it in in this way.

MR. SHARGEL: Very well." (A 91 - 93)

Counsel for Appellant made it very clear at the sidebar that these statements were not being admitted for the truth of what was said. As stated in United States v. D'Amato, supra:

> "Verbal acts - contemporaneous utterances explaining non-verbal conduct or its tenor - are not hearsay in the true sense, since they do not constitute an assertion to evidence the truth of a fact asserted, 6 Wigmore, Evidence, Section 1772 at 191 (3d ed. 1940)."

Kaplan's statements in the presence of Mrs. Ruggerio were offered simply to explain his presence on that afternoon. As such, there is no question but that they should have been admitted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction herein should be reversed and the case remanded for a new trial.

Respectfully submitted,

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